STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2000
v	No. 219055 Ingham Circuit Court
MICHAEL GENE COVINGTON, Defendant-Appellant.	LC No. 98-073710-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant Michael Gene Covington appeals as of right. A jury convicted him of breaking and entering a building with the intent to commit larceny therein.[1] The trial court sentenced him as a fourth habitual offender[2] to twenty to thirty years' imprisonment and ordered him to pay restitution in the amount of $500 in addition to the ordinary $60 assessment for the Crime Victim Rights Fund. We affirm.

I. Basic Facts And Procedural History

This criminal prosecution occurred after Covington broke into and entered Wilson's Heating and Air Conditioning on the night of June 8-9, 1998. The prosecutor alleged that Covington stole a computer, money from a gum ball machine, and other miscellaneous items from the business including an employee's shirt and a bottle of Asti Spumante.

At trial, there was considerable testimony about how the building appeared after the break-in. For instance, a door had been pried open breaking the casing, glass from a broken window was scattered on the floor, a key cabinet had been damaged, there was blood on a table, and doors and file cabinets had been opened and their contents strewn about the business. David Parks, Wilson's owner, thought the damage to the door indicated that the person who broke into the business used that door to

[1] MCL 750.110; MSA 28.305.

[2] MCL 769.12; MSA 28.1084.

leave. Parks stated that his employees did not normally leave their file cabinets and desk drawers opened and he did not give anyone permission to enter the business or to take items from the business on the day in question. Neither Parks nor Dennis Ostrander, a Wilson employee, could recall any connection between Wilson and Covington; they did not know Covington and did not believe he had ever been a Wilson employee or client.

Beth Jill Rios, a detention officer with the Lansing Police Department, testified that she took Covington's fingerprints on July 2, 1998. The prosecutor then asked:

> *Q.* Did you put the writing and the typing and so forth on this [fingerprint card]? How does that happen?
>
> *A.* *All this typing is already on the computer from the past times Michael's been there*,[3] and I just put the card through and X it on the computer and it types it in.
>
> *Q.* Everything is typed by computer?
>
> *A.* It's typed by a typewriter. It's already in the computer.
>
> *Q.* All right. So you made the marks on this, you signed the card?
>
> *A.* Right, and I put an X on the back for Michael to sign his name.
>
> *Q.* Did he sign it?
>
> *A.* Yes.

Covington did not object to this testimony and, on cross-examination, defense counsel merely asked Rios what a note on the fingerprint card meant and when it was made.

Kenneth Lucas, a fingerprint technician with the Lansing Police Department, explained the process of fingerprint identification and testified that he had to find eight or more corresponding points between a latent unknown print and an inked known print before he could determine that the latent print came from the same person who provided the inked print. Lucas also testified that he compared the latent fingerprints taken at the scene with Covington's fingerprint card. Some of the fingerprints taken from the crime scene were not identifiable, but he concluded that seven others belonged to Covington because each of these prints had at least twelve points of similarity between them.

At the close of the prosecutor's proofs, Covington moved for a directed verdict of acquittal. He argued that the only evidence tying him to the break-in was the fingerprint evidence from the glass, most of which was not found in the building, and there was no evidence that he broke the window. Further, there was no evidence that he was ever in the building and none of the allegedly stolen property

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[3] Emphasis supplied.

had been introduced into evidence. The prosecutor argued that when the trial court viewed the evidence in a light most favorable to the prosecution, it was clear that there was a breaking and someone entered the building with was an intent to commit larceny. The prosecutor acknowledged that there was only circumstantial evidence of Covington's identity as the perpetrator, but argued that the fingerprint evidence as a whole demonstrated that Covington was the perpetrator.

In ruling on Covington's motion for directed verdict, the trial court stated:

> Well, I suppose it's possible that Mr. Covington could have arrived upon the scene after the breaking and the door being opened and all that and picked up these pieces of glass and disposed of them in some manner. There is no question that his fingerprints are on the pieces of glass. What's the most reasonable assumption to arrive at? Is the jury reasonable to assume that he simply picked them up, arrived there, somebody else conducted a breaking and entering and he disposed of the pieces of glass and then didn't enter the building? Or is it more reasonable to assume that he broke the window with a rock, picked the pieces of glass out and committed the larceny therein and broke the door to get out because it would be easier than going out the window?
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> I think the latter is the more reasonable view of the evidence, and I think that the prosecutor has met its burden of establishing a prima facie case for the jury's consideration whether or not Mr. Covington committed this crime. I think a reasonable jury could find beyond a reasonable doubt that Mr. Covington is the one – he's the one who is charged and the one who committed the crime. So the motion is denied.

The trial court then asked the parties whether it should issue the same instructions to the jury that it had issued in a previous case[4] against Covington and whether Covington would be testifying. In response to the jury instruction issue, defense counsel stated, "I don't see any that would be any different, your Honor." Covington stated for the record that he did not wish to testify. He then rested without presenting any evidence.

In closing arguments, the prosecutor did not mention that the police computer had automatically provided information on the fingerprint card because Covington had been involved with other police matters, as Rios' testimony suggested. Nor did defense counsel mention this oblique reference to Covington's other contact with the police in his closing arguments.

The trial court instructed the jurors, among other things, that, to find Covington guilty of breaking and entering beyond a reasonable doubt, the prosecutor had to prove:

> First, that the defendant broke into a building. It does not matter whether anything was actually broken. However, some force must have been used. Opening a

[4] The trial court was referring to Covington's trial in lower court no. 98-073711-FH, which is being appealed in Docket No. 219008.

door, raising a window, taking off a screen are all examples of enough force to count as a breaking. Entering a building through an already open door or window without using any force does not count as a breaking.

Second, that the defendant entered the building. It does not matter whether the defendant got his entire body inside. If the defendant put any part of his body into the building after the breaking, that is enough to count as an entry.

Third, that the defendant broke and entered the building – when the defendant broke and entered the building he intended to commit larceny. Larceny is defined as the taking and carrying away of the property of another with the intent to deprive the owner permanently of the property.

The trial court did not instruct the jury on any lesser included offenses. After the jury began deliberating, defense counsel specifically stated that there were no objections to the instructions.

At sentencing, defense counsel noted a number of mitigating circumstances in support of his request for a lenient sentence. For instance, the crime was a nonviolent property crime that occurred when no one was likely to be harmed and Covington had a lengthy criminal record, which would likely deny him consideration or special favors while in prison. Covington did not address the trial court.

Before the trial court imposed sentence, it mentioned that Covington had escaped prison twice, had committed eight other felonies and ten misdemeanors, and had been engaged in a life of crime for more than twenty-five years. The trial court mentioned the impact that this crime had had on Wilson's. Covington's conduct caused a great deal of problems for the business because it lost its business records when the computer was stolen, the computer system itself cost $7,000 to replace.[5] Contrary to defense counsel's suggestion, the trial court concluded, this was not a victimless crime. Moreover, the trial court did not think that Covington was likely to change his criminal ways and that he should be "put out of harm's way for some considerable period of time." The trial court noted that, while the maximum sentence was life, the probation agent did not recommend a specific term of incarceration, only that it should be a lengthy term. The trial court then sentenced Covington to twenty to thirty years in prison and ordered that he pay restitution.

After sentencing, Covington moved for a new trial arguing that (1) the trial court erred when it admitted prior bad acts evidence, (2) the trial court erred by denying his motion for directed verdict because the evidence was insufficient, (3) the trial court failed to instruct jurors on lesser included offenses, and (4) the sentence was disproportionate. The trial court, with a different judge presiding, denied the motion on the record without elaboration. Covington raises these same issues on appeal.

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[5] Insurance covered all but a $500 deductible.

II. Motion For Directed Verdict

A. Standard Of Review

Covington contends that the trial court erred when it denied his motion for directed verdict. We review a trial court's ruling on a motion for directed verdict by testing the validity of the motion by the same standard as the trial court.[6] In effect, this is review de novo because this Court does not extend any deference to the trial court's findings or conclusions on this issue.

B. Legal Standard

When ruling on a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the defendant made the motion in order to determine whether a rational jury could conclude that prosecutor proved the essential elements of the charged crime beyond a reasonable doubt.[7] In so doing, the trial court must view this evidence in the light most favorable to the prosecutor[8] and may not weigh the evidence or determine whether witnesses were credible.[9] In concrete terms, the trial court in this case had to determine whether a rational jury could conclude that the prosecutor had proved beyond a reasonable doubt that (1) Covington broke into a building, (2) he entered the building, and (3) he intended to commit a larceny in the building when he committed the breaking and entering.[10] However, these elements could be proved by circumstantial evidence and reasonable inferences that could be drawn from it.[11]

C. Sufficiency Of The Evidence

Given that the review we must apply to the evidence is favorable to the prosecutor, we conclude that the evidence adduced at trial was sufficient to deny the motion for a directed verdict of acquittal. A reasonable jury could find that Covington was the person who perpetrated this crime because the police found his fingerprints on glass at the scene, he had never worked at Wilson, and no one could recall that he was a Wilson client. Accordingly, there was no other way to explain his fingerprints at the scene of the crime other than to conclude that he committed the crime. Having tied Covington to the crime, the rest of the elements are easy to discern from the evidence. The broken window and door show, in the most literal of ways, a breaking. The open desk drawers and the mess made with their contents demonstrate that Covington entered the building. The missing property is circumstantial evidence that Covington intended to commit a larceny at the time he broke into and

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[6] *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998), aff'd in part and rev'd in part on other grounds 462 Mich 415 (2000).

[7] *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

[8] *Id.*

[9] *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

[10] *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998).

[11] *Jolly*, *supra* at 466.

entered the building. Consequently, the trial court did not err when it denied Covington's motion for directed verdict.

III. Prior Bad Acts Evidence

A. Preservation Of The Issue And Standard Of Review

Covington asserts that the trial court erred when it allowed Rios to testify that the police computer system automatically entered information onto Covington's fingerprint card because it implied that he had been arrested previously. Thus, he contends, this was evidence of a prior bad act excludable under MRE 404(b). Because Covington did not object to this testimony at trial, he failed to preserve this evidentiary issue for appeal.[12] Accordingly, our review is limited to determining whether permitting this testimony was prejudicial and resulted in a miscarriage of justice, meaning that any error was outcome determinative.[13]

B. The Fingerprint Card Testimony.

MRE 404(b) provides in relevant part

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

As the Supreme Court explained in *People v VanderVliet*,[14] prior acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, Covington in this case. A fourth factor articulated in *VanderVliet*, which does not fully conform to the idea of a test expressed in the preceding three factors, suggests that a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence.[15]

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[12] MRE 103(a)(1).

[13] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[14] *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

[15] *Id*. at 75.

The problem we encounter with applying this test for prior acts evidence is that we cannot be certain that Rios actually referred to any prior act that Covington committed, much less an act that generally fits the profile of inappropriate propensity evidence. While a juror might be able to infer that Covington had been to the police station on a previous occasion, nothing Rios said indicated that he had had contact with the police because he committed a crime, was a suspect in a crime, or had committed any improper conduct. Even if we assume that this was inadmissible propensity evidence, this fragment of Rios' testimony does not overshadow the properly admitted evidence to the extent that we can conclude that it was outcome determinative.[16] Consequently, there is no error requiring reversal in this instance.

IV. Lesser Included Offense Instructions

Covington claims that the trial court erred when it did not instruct the jury on a variety of lesser offenses in addition to the breaking and entering charge. However, not only has he failed to preserve this issue for appeal by asking the trial court to instruct on these other offenses, he affirmatively waived any error in the instruction when defense counsel stated on the record that the defense did not object to the instructions as given.[17]

V. Sentencing

A. Standard Of Review

Covington also argues that his sentence is disproportionate to his crime and based solely on his status as an habitual offender without regard to his offense. We review a trial court's sentence imposed on an habitual offender for an abuse of discretion.[18] "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."[19]

B. Covington's History

The trial court enhanced the length of the prison sentence it imposed on Covington because he falls under the fourth habitual offender statute.[20] Rather than applying the habitual offender enhancement statute without giving any attention to Covington as an individual and the circumstances of this crime, the trial court noted Covington's long criminal history, which implied a resistance to rehabilitation and made incarceration necessary, as well as the circumstances of this crime. The sentence in this case also

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[16] *Lukity, supra*.

[17] *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000).

[18] *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

[19] *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

[20] MCL 769.12; MSA 28.1084.

conformed to the principle that when an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate.[21] Further, the trial court exercised its discretion not to impose the maximum penalty under permitted MCL 769.12; MSA 28.1084, which is life imprisonment. There was no abuse of discretion here.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[21] *Hansford*, *supra* at 326.